No. 87-1635

In The

Supreme Court of the United States

October Term, 1987

VIVIAN ALVAREZ, f/u/b/o AMERICAN HOME INSURANCE COMPANY,

Petitioner,

vs.

MERRILL STEVENS DRY DOCK COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA THIRD DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF IN OPPOSITION

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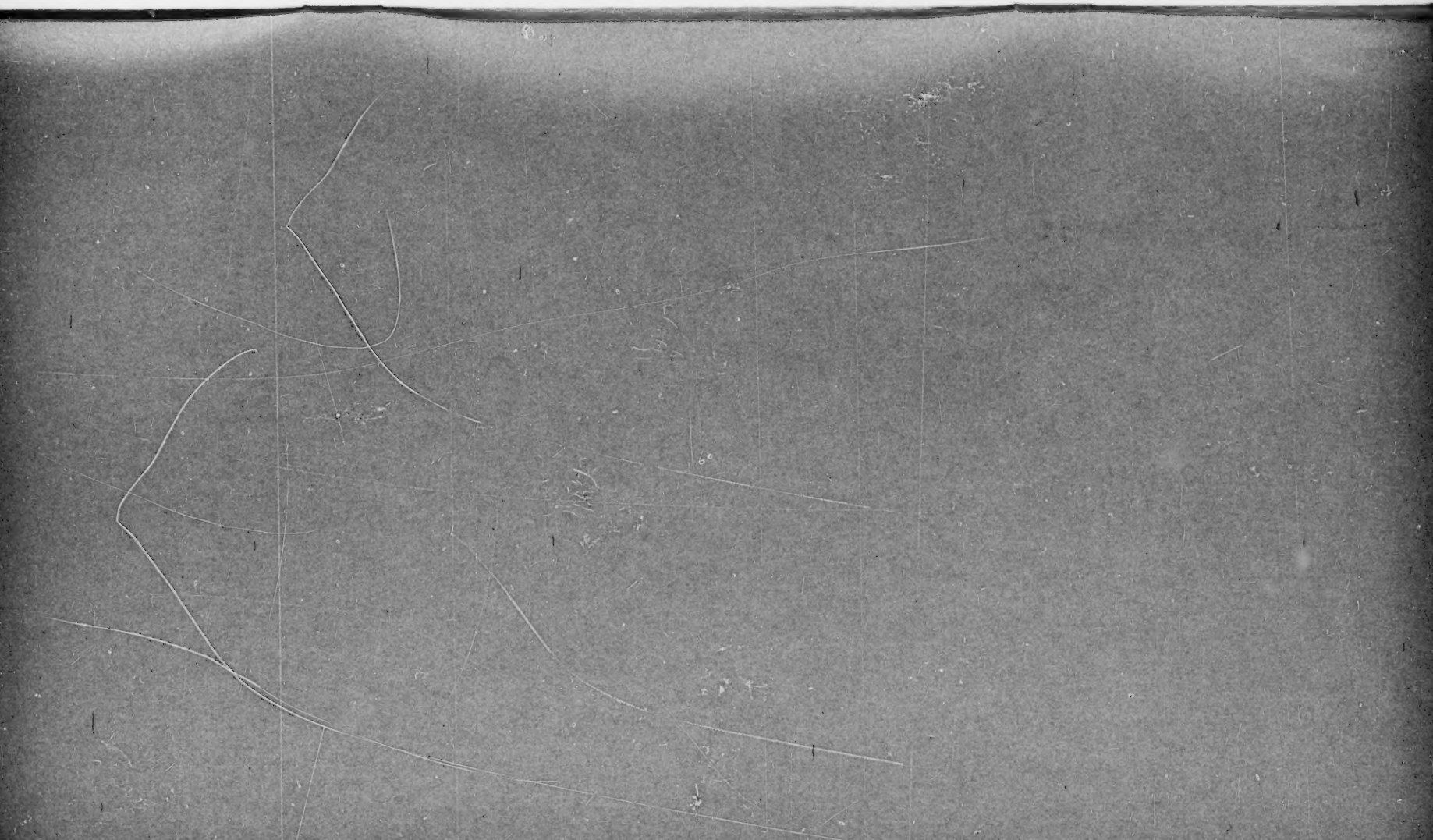

QUESTION PRESENTED

WHETHER A FLORIDA STATE COURT DECISION WHICH PROPERLY APPLIED ESTABLISHED MARITIME LAW PRINCIPLES IN INTERPRETING A PARTICULAR SHIP REPAIR CONTRACT AND WHICH CONFLICTS WITH NO FEDERAL DECISIONS PRESENTS ANY BASIS FOR REVIEW BY THIS COURT

LIST OF PARTIES

Vivian Alvarez, f/u/b/o American Home Insurance Company

Merrill Stevens Dry Dock Company

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STATEMENT OF THE CASE

Petitioner Alvarez' yacht ALISAN V sank at her dock in July of 1982, thus requiring the vessel to be raised and repaired. (Petitioner's Appendix, p. 2). Uncontested findings of fact made by the trial court establish that (1) based on the recommendation of a surveyor, competitive bids were solicited for the repairs to the yacht, (2) ultimately, the contract for repair was awarded to Respondent Merrill Stevens Dry Dock Company, and (3) Petitioner Alvarez and American Home Insurance Company, insurer of the ALISAN V and Petitioner-in-interest herein, arranged to have Merrill Stevens raise the yacht and perform the repairs. (Petitioner's Appendix, p. 2).

Failure to replace insulating blankets on the engine's turbo chargers during the repairs subsequently caused a fire which destroyed the vessel. (Petitioner's Appendix, p. 10). Petitioner-in-interest American Home paid Petitioner Alvarez the $150,000 found to be the fair market value of the yacht. (Petitioner's Appendix, p. 13). This suit represents American Home's subrogated claim seeking to recover the insurance monies it paid from Merrill Stevens. Merrill Stevens, relying on limitation clauses in the parties' ship repair contract, denied any obligation to reimburse American Home.

At all times the parties and Florida courts involved in this suit have been in accord that maritime law governs the parties' ship repair contract. The trial court—applying maritime law—initially held that the repair contract:

> clearly and unequivocally expresses the intent that Merrill Stevens shall have no liability for any dam-

> ages or losses sustained, whether in tort or contract unless and until it has been established that their conduct amounted to gross negligence. Such clauses under the maritime law, known as "Red Letter" clauses have been held to be valid and binding. *Todd Shipyard Corp. v. Turbine Service, Inc.*, 674 F.2d 401 (5th Cir. 1982); *Morton v. Zidell Explorations, Inc.*, 695 F.2d 347 (9th Cir. 1982); *Ortiz v. EJPM U.S.A., Inc.*, 553 F.Supp. 549 (S.D. Tex. 1982); *Noruna IV*, AMC 967 (D. Miss. 1982). Clause 7 was under all the circumstances surrounding these repairs binding on the parties, valid and enforceable.

(Petitioner's Appendix, p. 23). The trial court, on rehearing, changed its holding as to Merrill Stevens' liability, but on appeal the Florida Third District Court of Appeal reversed stating that the trial court's above statement was right in the first place. The clause was held valid, and the Third District concluded by stating: "This is simply an unambiguous arm's length transaction between parties of like bargaining power who were well able to allocate who was to bear the responsibility for insuring against loss." (Petitioner's Appendix, p. 24). Rehearing was denied, and thereafter the Florida Supreme Court also denied review. (Petitioner's Appendix, pp. 31-33).

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Respondent notes that Petitioner's Statement of the Case does not comply with this Court's Rule 21.1(h) which requires Petitioner to specify with reference to the record the manner in which the federal question presented for review was raised in the state courts. In fact, the argument advanced by Petitioner here (albeit incorrectly)—that the *Bisso* and *Edward* cases represent a blanket pro-

hibition of exculpatory clauses in all maritime contracts—was first raised by Petitioner on rehearing at the Florida Third District Court of Appeal. (Respondent's Appendix p. 24). Prior to that time, Petitioner's arguments comported with the actual state of the maritime law, i.e., that the enforceability of limiting or exculpatory clauses in ship repair contracts depends on equality of bargaining power and clarity. (Respondent's Appendix, p. 9).

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SUMMARY OF ARGUMENT

The state court decision of which Petitioner seeks review does not conflict with either of the cases cited by Petitioner. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) set down a rule prohibiting exculpatory clauses in *towage* contract cases. The *Bisso* rule has been restricted to towage cases, and in fact has been subjected to numerous exceptions even in the towage context. The uniform maritime rule in the ship repair contract context pertinent here is that exculpatory or limiting clauses in such contracts will be upheld absent evidence of overreaching, inequality of bargaining power, or ambiguity. *Edward Leasing Corp. v. Uhlig & Assoc., Inc.*, 785 F.2d 877 (11th Cir. 1986), also cited by Petitioner, actually articulated the repair contract rule, and merely held the particular clause in that case invalid.

The state court decision herein properly applied the established maritime rule, and in no way conflicts with *Bisso* or *Edward Leasing*. Petitioner has presented no

basis for the exercise of certiorari jurisdiction by this Court. The petition should be denied.

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ARGUMENT

Contrary to Petitioner's assertion, the Florida appellate decision herein *conforms* with the federal maritime law which was properly applied by the state court in consideration of this ship repair contract.

Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955), with which Petitioner quite incorrectly suggests conflict, held that exculpatory clauses in *towage contracts* are invalid as a matter of public policy. The *Bisso* court's decision was based on what the majority then perceived as "potential monopolistic power" of the towage industry which placed towers in a position to overreach. 349 U.S. at 91.[1] The *Bisso* decision was directed to the towage industry, and the *Bisso* rule has been consistently restricted

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[1] The *Bisso* dissent noted the lack of evidence to support the conclusion that the towage industry "was characterized by monopolistic tendencies or inequality of bargaining power . . ." 349 U.S. at 118, n. 14. Questions as to the soundness of the *Bisso* majority's assessment of the economic underpinnings of the towage industry have continued. *See, e.g.*, Harlan, J., concurring in Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co., 372 U.S. 697 (1963); Seley Barges, Inc. v. Tug EL LEON GRANDE, 396 F.Supp. 1020 (E.D.La. 1974), *aff'd*, 513 F.2d 628 (5th Cir. 1975). The instant case is not a towage case so the continuing validity of *Bisso* is not presented here.

to towage contracts.[2] In fact, significant erosion of the *Bisso* rule has occurred even in the towage context.[3]

Bisso has not only been restricted to towage cases but it is also specifically distinguished and held *not* controlling in ship repair contract cases. The uniform rule as to ship repair contracts is that exculpatory or limiting clauses

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2 *See*, e.g., Hercules, Inc. v. Stevens Shipping Co., Inc., 698 F.2d 726 (5th Cir. 1983); Hicks v. Ocean Drilling and Exploration Co., 512 F.2d 817 (5th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); People of the State of California v. S/T NORFOLK, 435 F.Supp. 1039 (N.D.Cal. 1977); Ortiz v. ETPM-U.S.A., Inc., 553 F.Supp. 549 (S.D.Tex. 1982); Pure Oil Co. v. M/V CARIBBEAN, 235 F.Supp. 299 (W.D.La. 1964) *aff'd* Pure Oil Co. v. Boyne, 370 F.2d 121 (5th Cir. 1966); National Distillers Products Corp. v. Boston Tow Boat Co., 134 F.Supp. 194 (D.Mass. 1955); Allied Chemical Corp. v. Gulf Atlantic Towing Corp., 244 F.Supp. 2 (E.D.Va. 1964); Reederei Franz Hagen v. Diesel Tug Resolute, 400 F.Supp. 680 (D.Md. 1975); Island Creek Fuel and Transport Co., Delaware v. Kenova Terminal Co., 150 F.Supp. 479 (S.D. W.Va. 1957); Coastal States Petrochemical Co. v. Montpelier Tanker Co., 321 F.Supp. 212 (S.D.Tex. 1970); and cases cited re ship repair contracts, *infra*.

3 *See*, e.g., M/S BREMEN v. Zapata Off-Shore Co., 407 U.S. 1 (1972); Southwestern Sugar & Molasses Co. v. River Terminals Corp., 360 U.S. 411 (1959); Smith v. Shell Oil Co., 746 F.2d 1087 (5th Cir. 1984); Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp., 707 F.2d 1086 (9th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); BASF Wyandotte Corp. v. Tug Leander, 590 F.2d 96 (5th Cir. 1979); Twenty Grand Offshore, Inc. v. West India Carriers, Inc., 492 F.2d 679 (5th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974); In re Gulf & Midlands Barge Lines, Inc., 509 F.2d 713 (5th Cir. 1975); Fluor Western, Inc. v. G & H Offshore Towing Co., Inc., 447 F.2d 35 (5th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972); Chile Steamship Co., Inc. v. The Tug McAllister, 168 F.Supp. 700 (S.D.N.Y. 1958). *See also* Note: "Admiralty—The Undermining of the Bisso Rule," 9 Mem. St.L.Rev. 223 (1979); "The Continuing Erosion of Bisso—Waiver of Subrogation and Benefit of Insurance Clauses," Dixon and Canning, Insurance Counsel Journal (1977).

will be upheld absent a showing of overreaching, ambiguity, or unequal bargaining power. *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577 (5th Cir. 1986); *B.H. Morton v. Zidell Explorations, Inc.*, 695 F.2d 347 (9th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); *Todd Shipyards Corp. v. Turbine Service, Inc.*, 674 F.2d 401 (5th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982); *M/V AMERICAN QUEEN v. San Diego Marine Construction Corp.*, 708 F.2d 1483 (9th Cir. 1983); *Alcoa Steamship Co. v. Charles Ferran & Co., Inc.*, 383 F.2d 46 (5th Cir. 1967), *cert. denied*, 393 U.S. 836 (1968); *Hudson Waterways Corp. v. Coastal Marine Service, Inc.*, 436 F.Supp. 597 (E.D.Tex. 1977).

The Petitioner's remaining and equally inappropriate "conflict" case—*Edward Leasing Corp. v. Uhlig & Associates, Inc.*, 785 F.2d 877 (11th Cir. 1986)—in fact specifically articulates the distinction made between ship repair contract cases and *Bisso:*

> Since *Bisso*, several admiralty cases dealing with the limitation of liability clauses in boat repair contracts have distinguished *Bisso* and held that parties to such repair contracts may validly stipulate that the repairer's liability is to be limited . . . *The rationale behind upholding such clauses, so long as no overreaching is found, is that businessmen can bargain this in their negotiations and set their ultimate price accordingly.*

785 F.2d at 888.[4] This was precisely the rationale utilized by the state court herein. No conflict with *Edward Leasing* exists.

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[4] The *Edward Leasing* court simply found that the particular clause involved in that case was ambiguous and unenforceable.

The Florida appellate court here applied the proper maritime rule for ship repair contracts and—based on the uncontested conclusion that no unequal bargaining positions between the parties existed—enforced the limitation clause in the parties' negotiated repair contract. There is no conflict with *Bisso* which applies only in towage contract cases, and no conflict with *Edward* which *states* the very rule applied in the decision herein.

Petitioner's two policy suggestions for exercise of certiorari review are similarly without merit. As to the first, Petitioner has no record support for its assertion that Florida's shipyards will be in a position to overreach if the state court's decision stands. No showing of monopolistic potential was made in this case. In fact, this record shows quite the reverse. There is a specific trial court finding that Petitioner solicited *competitive bids* for the repairs to the yacht.

Second, Petitioner's implication that the state court applied Florida law is completely refuted by the face of the state court's opinion, which refers only to federal maritime cases and cites no Florida case law at all. Absolutely nothing about the decision implies that state law applies in maritime cases.

In final, this was a case where yacht owner Alvarez and yacht insurer American Home Insurance Company solicited competitive bids for yacht repairs, and then selected and entered a contract with Merrill Stevens Dry Dock Company. As parties with equal bargaining power, they were held to their unambiguous agreement in precise conformity with the controlling maritime law. The case is of no significance to anyone but the parties. No rea-

son is presented for this Court to exercise certiorari jurisdiction.

CONCLUSION

Based on the foregoing facts and authorities, Respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing Respondent's Brief in Opposition were mailed this 2 day of May, 1988 to:

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APPENDIX

APPENDIX

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

Case Number 86-1732

———o———

MERRILL STEVENS DRY DOCK COMPANY

Appellant,

v.

VIVIAN ALVAREZ, f/u/b/o AMERICAN
HOME INSURANCE COMPANY

Appellee/Cross-Appellant

_____/

On Appeal from the Circuit Court
of the Eleventh Judicial Circuit
In and for Dade County, Florida

———o———

ANSWER BRIEF OF
APPELLEE/CROSS-APPELLANT

———o———

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CASES

STATEMENT OF THE CASE AND FACTS

1. STATEMENT OF FACTS

On July 12 or 13, 1982, the yacht ALISAN V sank at its dock. T.18.[1] The owners of the yacht contacted MERRIL STEVENS DRY DOCK COMPANY who raised the vessel and towed it to their facility at Dinner Key Marina, Miami, Florida. T.33-34. Thereafter, surveyor Alex Milligan surveyed the vessel and based upon that survey, MERRILL STEVENS submitted its bid for the necessary repairs. The contract for repairs was awarded to MERRILL STEVENS based upon that bid. R.128; T.35, lines 6-9.

MERRILL STEVENS contracted, in part, to overhaul the engines and reinstall them in the vessel. R.128-129. The ALISAN V had two turbocharged Detroit Diesel 671T1 engines. R. 129. Before the vessel sank in July, 1982, the turbochargers were covered with protective insulation coverings, which were referred to at trial as the "turbocharger blankets". R. 219; *See e.g.* T.19; T.37-41; and T.47-48.

MERRILL STEVENS removed the engines and turbochargers from the ALISAN V and they were trucked to Pitts Transmission with whom MERRILL STEVENS subcontracted the engines' overhaul. R.129-130. Neither the owners nor their insurers participated in selecting Pitts, and the owners and insurers were billed directly by

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1. Citations to the trial transcript will be designated by "T" followed by the page number. Citations to the record will be designated by "R" followed by the page number. Exhibits, or portions thereof, will be designated by "A" followed by the page number and are attached hereto as an appendix.

MERRILL STEVENS for work performed by Pitts. R. 219, T.37. (There is no dispute that MERRILL STEVENS is liable to Plaintiffs for any fault or negligence on the part of their subcontractor.)

In August, 1982, MERRILL STEVENS employee Mike Vores was requested by Pitts Transmission to prepare a purchase order directed to Johnson and Towers, Inc., a supplier of General Motors parts, requesting two turbocharger blankets for the ALISAN V. R. 130; T.57-59; A.1. Johnson and Towers never delivered the turbocharger blankets because they were back-ordered. R.130; T.38-41; T.59; A.2. MERRILL STEVENS never pursued the matter to assure that turbocharger blankets were otherwise procured for the ALISAN V. T.41. The ALISAN V was delivered to her owner on April 29, 1983 without any turbocharger blankets. R.131. On May 1, 1983, the owners of the ALISAN V took her from their home on Northern Biscayne Bay—near 79th Street—to the anchorage at Elliott Key in Southern Biscayne Bay. R.131; T.16. As the vessel was arriving at the Elliott Key anchorage, a smoky smell was noted in the main salon. R.131. Soon the vessel was burning out of control despite the efforts of the owners and John "Moby" Griffin, a marine salvor who was at the anchorage and who had come to assist when he noted the vessel on fire. R.131-132. The vessel was declared a constructive total loss. T.13. The Court found, based upon expert testimony, that the cause of the fire was the absence of turbocharger blankets on the ALISAN V with the concomitant proximity of flammable materials in the engine compartment. T.132. The Court found Plaintiff's damages to be $222,249.00 and denied Plaintiff's claim for attorneys fees. R. 136.

II. COURSE OF PROCEEDINGS AND DISPOSITION IN THE LOWER TRIBUNAL.

The Plaintiff, VIVIAN ALVAREZ f/u/b/o AMERICAN HOME INSURANCE COMPANY sued MERRILL STEVENS DRY DOCK COMPANY alleging causes of action sounding in negligence and for breach of MERRILL STEVENS' express and implied warranties of workmanlike performance. A non-jury trial was conducted on March 10 and 11, 1986.

On April 28, 1986, the Court signed Findings of Facts and Conclusions of Law, R.86-94, which held that MERRILL STEVENS could not be liable for Plaintiff's damages based upon Paragraph 7 printed on the reverse side of MERRILL STEVENS' Work Order and Repair Contract. A.3. On May 8, 1986, Plaintiff filed its Motion for Rehearing and Motion to Amend Findings of Facts and Conclusions of Law. R.83-84. That Motion was granted at the hearing of May 30, 1986, and Amended Findings of Facts and Conclusions of Law were signed on June 11, 1986. R.128-136.

The Court held that Paragraph 1 constituted an express warranty that MERRILL STEVENS could not repudiate by any subsequent attempted exculpatory language contained within Paragraph 7 of its Work Order. R. 135.

Defendant/Appellant MERRILL STEVENS appeals the Court's ruling that MERRILL STEVENS is liable to Plaintiff for breach of its express warranty of workmanlike performance notwithstanding the attempted exculpatory language—the so-called "red letter" clause—printed on the reverse side of MERRILL STEVENS' Work Order and Repair Contract. Plaintiff/Appellee/

Cross-Appellant, VIVIAN ALVAREZ f/u/b/o AMERICAN HOME INSURANCE COMPANY, cross-appeals that portion of the Amended Findings of Facts and Conclusions of law wherein the Court denied attorneys fees as an element of Plaintiff's damages for breach of the warranty of workmanlike performance. R. 136.

SUMMARY OF ARGUMENT

MERRILL STEVENS cannot exculpate itself from liability for negligence or breach of the warranty of workmanlike performance where MERRILL STEVENS expressly warrants to perform the repairs in good and workmanlike manner and where the purported exculpatory language is conflicting, confusing and deceptive. The Final Judgment against MERRILL STEVENS should, therefore, be affirmed.

In admiralty when a ship repairer breaches the warranty of workmanlike performance, the shipowner is entitled to receive full compensatory damages, attorneys fees and litigation expenses. The trial court's ruling denying attorneys fees and litigation expenses should, therefore, be reversed and remanded.

ARGUMENT

I

MERRILL STEVENS EXPRESSLY WARRANTED TO REPAIR THE ALISAN V IN A GOOD AND WORKMANLIKE MANNER AND CANNOT EXCULPATE ITSELF FROM THAT EXPRESS WARRANTY.

The Court found as a factual matter that MERRILL STEVENS was negligent and breached its express and im-

plied warranties to repair the vessel in a good and workmanlike manner. MERRILL STEVENS does not dispute this finding.

The issue here is whether, having breached these duties and warranties, MERRILL STEVENS can rely on confusing and vague language and be exculpated from all liability.

A "Red Letter" clause in a ship repair contract is defined as one which limits the repairer's liability for negligence or breach of contract to a specific monetary amount. *See e.g. Todd Shipyards Corp. v. Turbine Services, Inc.*, 674 F.2d 401, 410 (5th Cir. 1982). Red letter clauses are distinguished by maritime courts from other similarly phrased clauses which purport to effectively exculpate the repairer from liability for negligence or breach of contract. *Edward Leasing Corp. v. Uhlig & Associates, Inc.*, 785 F.2d 877, 888-89 (11th Cir. 1986). Red letter clauses—that is, limitation of liability clauses—are generally valid. *Todd Shipyards Corp. v. Turbine Services, Inc.*, 674 F.2d 401 (5th Cir. 1982). Conversely, exculpatory clauses are strongly disfavored, *Bisso v. Inland Waterways Corp.* 349 US 85, 75 S.Ct. 629, 99 L.Ed. 2d 911 (1955), and, they will be upheld only on rare occasions and are subject to the strictest scrutiny. *Edward Leasing*, 785 F.2d 877; *Hudson Waterways Corp v. Coastal Marine Services, Inc.*, 436 F.Supp.597 (ED, Tex.1977).

Originally, the trial court confused these two distinct types of clauses, finding that the language here was a valid red letter clause. R.86-94. On rehearing, R.83-84, the Court recognized the distinction and held that MER-

RILL STEVENS could not repudiate its express warranty of workmanlike performance. R. 135. The language which is at issue is as follows:

> 1. *Contractor agrees to repair said vessel in a good and workmanlike manner* pursuant to the terms as outlined, and the owner and/or vessel agrees to pay contractor for said work, labor and materials as hereinafter stated. *Other than specifically set forth herein,* contractor makes no warranties concerning its workmanship or material either express or implied, including any implied warranty of merchantability or fitness for a particular purpose.
>
> * * *
>
> 7. Contractor undertakes to perform the work outlined * * * only upon the condition that it shall not be liable, directly or indirectly, in contract, tort, or otherwise * * * unless such (damage) is caused by contractor's gross negligence or the gross negligence of any of its employees, which gross negligence shall not be presumed but must be affirmatively established. *In no event, including the negligence and/or the gross negligence and/or the breach of contract by contractor, shall the contractor's liability to such parties in interest for personal injury, death or damage* * * * *exceed the sum of $300,000.00.*

The contract to repair a vessel is a maritime contract and subject to the law of admiralty. *Northern Pacific S.S. Company v. Hall Brothers Marine Railroad and Shipbuilding Company,* 249 U.S. 119, 39 S.Ct. 221 (1919); *Alcoa Steamship Company, Inc. v. Charles Ferran and Company, Inc.* 383 F.2d 46, 1957 AMC 2578 (5th Cir. 1967), *cert. denied,* 393 US 836, 89 S.Ct. 11 (1962) (hereinafter referred to as the "*Alcoa Corsair*"). "Once Admiralty juris-

diction is established, then all of the substantive rules and precepts of the law of the sea become applicable." *Cigarette Racing Team v. Gandee,* 418 So.2d 337 (3rd DCA 1982); *see also Branch v. Schumann,* 445 F.2d 175 (5th Cir. 1971); *Miami Valley Broadcasting v. Lang,* 429 So.2d 1333 (3rd DCA 1983); and *Still v. Dixon,* 337 So.2d 1033 (Fla.2d DCA 1971). "The traditional rule of construction in Admiralty cases is to construe the contract language most strongly against the drafter and that an ambiguous clause in a maritime contract is to be interpreted under maritime, not state, law." *Edward Leasing Corp. v. Uhlig & Associates, Inc.,* 785 F.2d 877 at 889 (11th Cir.1986). *See also Navieros Oceanikos S.A. v. S.T. MOBILE TRADER,* 1977 AMC 739, 745 (2d Cir. 1977); *Capozziello v. Brasileiro,* 443 F.2d 1155, 1157 (2d Cir. 1971); *American Export Isbrandsten Lines, Inc. v. United States,* 390 F. Supp. 63, 66 (SDNY 1975); and *United States v. Seckinger,* 397 US 203, 210-211, 90 S.Ct. 880, 884-85, 25 L.Ed 2d 224 (1970).

Here, the first sentence of Paragraph 1 quoted above gives rise to an express warranty to "repair the vessel in a good and workmanlike manner." The second sentence of Paragraph 1 purports to disclaim any express or implied warranties, including warranties of merchantability or for a particular purpose. However, this purported disclaimer is prefaced by the phrase "other than as specifically set forth herein". This clearly refers to the express warranty of workmanlike performance set forth in the immediately preceding sentence.

The above-quoted language in Paragraph 7 is inconsistent and confusing. While this Court does not need to determine whether the $300,000.00 limitation is valid (because the damages here are less than $300,000.00), the

confusion and inconsistency is easily illustrated. On the one hand, Paragraph 7 purports to expulcate MERRILL STEVENS from all liability except for gross negligence. The second sentence, however, attempts to limit liability, *including liability for negligence and breach of contract* to $300,000.00. If the first sentence is true, then the phrase "including liability for negligence and breach of contract" is contradictory and unnecessary. One simply cannot tell what the writer meant.

In *Edward Leasing Corp. v. Uhlig & Associates, Inc.*, 785 F.2d 877 (11th Cir. 1986), the Eleventh Circuit was confronted with a similar situation. Edward Leasing contracted with Uhlig for Uhlig to perform certain repairs on the M/Y JANETTE. The contract contained certain clauses—referred to as "red letter" clauses—which Uhlig argued absolved them from all liability. The court quoted the clauses at length and found them to be in conflict, deceptive and, therefore, void. 785 F.2d at 888-89. The court also held that the attempted disclaimer of all liability was unenforceable. 785 F.2d at 888.

> The clauses in the Uhlig & Associates contract do not deter negligence on the part of the repairer, but affords a false sense of protection to the shipowner, and therefore are contrary to the public policy as set forth in *Bisso v. Inland Waterways Corp.*, 349 US 85, 75 S. Ct. 629, 99 L.Ed.2d 911 (1955). *See also Todd Shipyards*, 674 at 410. 785 F.2d at 888.

In *Bisso*, the Supreme Court held invalid an exculpatory clause purportedly absolving a towing company from all liability arising from its negligence in towing a vessel. The Supreme Court through Justice Black reasoned that the policies for striking down such clauses are

(1) to discourage negligence by making wrongdoers pay for the damage they cause, and (2) to protect those in inferior bargaining positions from overreaching. *See also Hart v. Blakemore,* 410 F.2d 218 (5th Cir. 1969) (holding that a written agreement which purportedly freed defendant from all liability, including negligence, was void on the basis that a contract to release one's own negligence is contrary to the public policy and unenforceable.)

As the Eleventh Circuit noted in *Edward Leasing,* there have been several Admiralty cases since *Bisso* construing limitation of liability clauses in marine repair contracts. In its Initial Brief, MERRILL STEVENS relies on the *Alcoa Corsair,* 385 F.2d 46 (5th Cir. 1967); *Jig the Third Corporation v. Puritan Marine Insurance Underwriters Corp.,* 519 F.2d 171 (5th Cir. 1975) *cert. denied* 424 U.S. 954 (1976); *Hudson Waterways Corp. v. Coastal Marine Services, Inc.,* 436 F.Supp. 597 (E.D. Tex. 1977); and *Todd Shipyards Corporation v. Turbine Services, Inc.,* 674 F.2d 401 (5th Cir. 1982). MERRILL STEVENS cites these cases for the proposition that "maritime courts have routinely sustained the validity of substantially similar clauses to the ones in issue here where the action was founded on breach of an implied warranty of workmanlike performance." Appellant's Initial Brief at Page 7-8. This statement contained in Appellant's brief is simply not correct.

In *Hudson Waterways,* 436 F.Supp. 597, the District Court in construing a ship repair contract stated as follows:

> Immunity from liability for one's own negligence 'can arise only from the plainly expressed intention of the parties, manifested by the language couched in un-

> mistakeable terms.' (Citations omitted). Thus, the court must examine the language of the contract in the light of the surrounding circumstances to see if it manifests an intention on the part of the parties that defendant is not to be held liable, even for its own negligence. (Citations omitted). It is the objective intention of the parties not the subjective intention, that the court must ascertain. (Citations omitted). The language of the contract must be viewed from the standpoint of the parties, the relative freedom of action and real bargaining strength. (Citations omitted).
>
> The language of the contract states that ' . . . we undertake to perform work . . . only upon condition that we shall not be liable in any respect to or by any vessel, . . . or individual person directly or indirectly, in contract, tort or otherwise, to its owners, charterers, underwriters, etc., for any injury, loss or damage to or by such vessel, . . . or person or for any consequences thereto.' In the court's opinion, this clause in the contract unequivocally states that the defendant is not to be held liable by the plaintiff, even for the defendant's own negligence. The language in the contract is strong. It states that the defendant undertakes to perform work only upon the condition that defendant will not be held liable in any respect, for any injury, loss or damage, to the vessel or its owners. *Hudson Waterways*, 436 F.Supp. at 605.

Clearly, the court looked at the express language at issue and carefully analyzed it in light of the circumstances. In addition to the above quoted excerpt, the *Hudson Waterways* court quoted the full text of the contract. See 436 F.Supp. at 604, n. 12. The court's ruling was far from routine as Appellant suggests, and was based upon express language, not an implied warranty, which, unlike the present case, clearly expressed the intention of the parties.

Likewise, in the *Alcoa Corsair,* 242 F.Supp. 962 (E.D. La. 1965) *aff'd.* 383 F.2d 46 (5th Cir. 1967), the court quoted and considered the exact language at issue:

> *We contract only upon the following terms,* applicable to every contract; . . . furthermore, we undertake to perform work on vessels . . . only upon the condition that we shall not be liable in respect to any one vessel, directly or indirectly, in contract, tort or otherwise, . . . unless such injury is caused by our negligence or by the negligence of our employees and in no event shall our aggregate liability to all such parties in interest for damages sustained by them . . . exceed the sum of $300,000.00. *Alcoa Corsair,* 242 F. Supp. at 965.

The language in the *Alcoa Corsair* is distinguishable from that here in that it does not contain an express warranty. Similarly, unlike the present case, the "red letter" clause at issue in the *Alcoa Corsair* provides that the repairer would be liable for negligence. Expressly relying on the policy considerations of *Bisso* the Fifth Circuit held that the repairer's potential liability for negligence to the extent of $300,000.00 was sufficient to deter negligence; and that the evidence showed that Alcoa's bargaining position was not that inferior vis-a-vis the repairer. The exculpatory language in MERRILL STEVENS' contract would not deter negligence. Rather, it would be a disincentive for following workmanlike standards in the repair of vessels since MERRILL STEVENS would not be responsible for any consequences. Such results would be dramatically different from what the Fifth Circuit contemplated in the *Alcoa Corsair.*

Todd Shipyards Corp. v. Turbine Services, Inc., 674 F.2d 401 (5th Cir. 1982) similarly dealt with a "red letter

clause" which limited liability for negligence or breach of contract to $300,000.00. 674 F.2d at 410. *Todd* is therefore distinguishable since here MERRILL STEVENS seeks not to limit liability for negligence or breach of warranty, but seeks to completely exculpate itself.

Appellant's reliance on *Jig the Third*, 519 F.2d 171 (5th Cir. 1975) is grossly misplaced. There, the Fifth Circuit held that a shipbuilder's attempted disclaimer did not exculpate the shipbuilder from liability for negligence or breach of contract arising from the sinking of one of its vessels. The court, again, quoted the warranty at length and held that based upon either the general maritime law or Florida law, the language was not clear and unequivocal, and therefore, unenforceable. Thus, *Jig the Third* stands for exactly the opposite proposition than what Appellant argues.

Similarly, in the M/V AMERICAN QUEEN v. San Diego Marine Construction, 708 F.2d 1483 (9th Cir. 1983), "the limitation clause was not an absolute exculpatory clause either, but rather absolved the repairer of liability if notice was not given within 60 days; it allowed for liability up to $100,000.00, as well. The court was not dealing with a total limitation of liability. 708 F.2d at 1487." *Edward Leasing* 785 F.2d 888-89.

Moreover, the record contains ample evidence of overreaching on the part of MERRILL STEVENS. First, the language upon which MERRILL STEVENS relies is printed on the reverse side of its Work Order and Repair Contract. A.3. The contract for repair of the ALISAN V was awarded to MERRILL STEVENS based upon a bid which was submitted pursuant to Alex Milligan's survey.

R.128. MERRILL STEVENS introduced no evidence showing that the language upon which it relies was contained within their bid.

There is similarly no evidence showing that owners or the assurers had an opportunity to negotiate the terms of MERRILL STEVENS' printed form. *Cf. Hudson Waterways,* 436 F.Supp. 605, 606. The contract there contained a provision stating that "additional liabilities will be assumed by us upon request . . . and an appropriate adjustment made in the price". 436 F.Supp. at 676.

Similarly, in the *Alcoa Corsair,* 383 F.2d 46, the repairer introduced evidence that the parties had done business numerous times and each time they understood that the red letter clause was applied to each contract. Conversely, here, MERRILL STEVENS introduced no such evidence. Thus, the conflicting and confusing language of MERRILL STEVENS' repair contract when coupled with the overreaching on the part of MERRILL STEVENS renders the contract unconscionable and does nothing to deter negligence or breach of contract. *Edward Leasing,* 785 F.2d 887, 89.

Whether the court looks to the general maritime law, as discussed above, or to Florida law as Appellant argues in its Initial Brief, the result is the same. *See Jig the Third, supra.* Since Appellant argues the applicability of Florida law—despite Appellant's apparent agreement that this case is governed by General Maritime law (Appellant's Initial Brief at page 6)—Florida law should also be considered. In Florida, exculpatory clauses have traditionally been disfavored and such clauses must be construed strictly against the drafter. *Harbor One, Inc. v.*

Preston, 172 So. 2 478 (Fla. 3rd DCA 1965). On those rare occasions where these clauses may be upheld, such should only occur in those cases where the language of the exculpatory clause is clear, unambiguous and where the contract is drawn between those in equal bargaining position. *Ivey Plants, Inc. v. FMC Corporation,* 282 So.2d 205 (Fla. 4th DCA 1973); *Sniffen v. First National Bank of Broward,* 375 So.2d 902 (Fla. 4th DCA 1979). Here, contractual language, as noted above, is far from clear and unequivocal and whether Florida or General Maritime law is applied, the result is the same. *Jig the Third,* 519 F.2d 171; *Sniffen,* 375 So.2d 902; *Ivey,* 282 So.2d 902.

II.

THE COURT ERRED IN FAILING TO AWARD ATTORNEYS FEES FOR BREACH OF MERRILL STEVENS' WARRANTY OF WORKMANLIKE PERFORMANCE

In Admiralty, one who contracts to repair a vessel is bound by the implied warranty of workmanlike performance. *Todd Shipyards Corp. v. Turbine Services,* 674 F.2d 401 (5th Cir. 1982); and *Parfait v. Jahnecke Services, Inc.,* 484 F.2d 296 (5th Cir. 1973.)

The warranty of workmanlike performance is breached by a repairer when:

> A shipowner, relying on the expertise of another party (the contractor) enters into a contract whereby the contractor agrees to perform services without supervision or control by the shipowner, the improper, unsafe or incompetent execution of such services would foreseeably render the vessel unseaworthy or bring into play a preexisting unseaworthy condition;

> the shipowner would thereby be exposed to liability regardless of fault. *Fairmont Shipping Corp. v. Chevron International Oil Company*, 511 F.2d 1252 (2nd Cir. 1975), *cert. denied* 423 U.S. 838 (1975). *Stevens v. East West Towing Company, Inc.*, 649 F.2d 1104 (5th Cir. 1981).

When a vessel owner proves that a repairer breached the warranty of workmanlike performance, which breach proximately caused his damages, the party is entitled as a matter of law to full indemnity for his loss, including actual litigation expenses (as opposed to taxable costs) and attorneys fees. *Todd Shipyards Corp. v. Turbine Services, Inc.* 674 F.2d 401 (5th Cir. 1982); and *Parfait v. Jahnecke Services, Inc.* 484 F.2d 296 (5th Cir. 1973).

In *Todd*, the Fifth Circuit repeated the rule that:

> In this circuit foreseeable damages resulting from the breach of warranty of workmanlike performance include attorneys fees and litigation expenses. *Strachan Shipping Company v. Konin Klyke Nederlandsche*, 342 F.2d 746 (5th Cir. 1963); *McCawley v. Ozeannosun Compania Maritime, S.A.*, 505 F.2d 526, 532 (5th Cir. 1974); *Accord Thibodeaux v. Texas Eastern Transmission Corp.*, 548 F.2d 581 (5th Cir. 1977). *Todd*, 674 F.2d at 415.

The rationale for this rule is that damages awarded for breach of contract, or specifically the warranty of workmanlike performance, should return the party to the position he would have occupied had the contract or warranty not been violated.

> It is too well settled to require citation to authority that damages awarded for breach of contract should return the party to the position he would have occupied had the contract not been violated. Owners

> are entitled to have the L.P. turbine in the condition contracted for, and to recover as well for the loss of use of the vessel, out-of-pocket expenses and (*since the defendants breached the warranty of workmanlike performance*) *costs and attorney's fees. Todd,* 674 F.2d at 412.

Here the court at trial reserved jurisdiction to receive evidence on attorneys fees and costs upon post-trial motions. However, since the Court ruled that attorneys fees would not be recoverable, no such hearing has ever been held.

Appellee/Cross Appellant respectfully requests this Court reverse and remand the trial court's decision regarding attorneys fees with instructions to conduct an evidentiary hearing concerning the reasonable amount of attorneys fees and litigation expenses to be awarded to Appellee/Cross-Appellant.

CONCLUSION

Based upon the foregoing argument and citation of authorities, it is respectfully submitted that the trial court properly held that MERRILL STEVENS cannot exculpate itself from liability for breach of its express warranty and the Final Judgment must therefore be affirmed; and, the trial court erred in denying Plaintiff's claim for attorneys fees and litigation expenses and this Court should remand this case with instructions to conduct an evidentiary hearing regarding attorneys fees and litigation expenses.

Respectfully submitted,

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By: /s/ Domingo C. Rodriguez
DOMINGO C. RODRIGUEZ

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this 18th day of December, 1986 mailed a copy of the Answer Brief of Appellee/Cross-Appellant to Debra L. Brady and G. Morton Good, Smathers & Thompson, Attorneys for Appellant, 1301 Alfred I. duPont Building, 169 E. Flagler Street, Miami, Florida 33131.

/s/ Domingo C. Rodriguez
DOMINGO C. RODRIGUEZ

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA

THIRD DISTRICT

CASE #86-1732

MERRILL STEVENS DRY DOCK
COMPANY,

Defendant/Appellant

v.

VIVIAN ALVAREZ, f/u/b/o
AMERICAN HOME INSURANCE
COMPANY,

Plaintiff/Appellee

_____/

MOTION FOR REHEARING AND MOTION
FOR REHEARING EN BANC

COMES NOW the Plaintiff/Appellee, VIVIAN ALVAREZ f/u/b/o AMERICAN HOME INSURANCE COMPANY, by and through its undersigned counsel, pursuant to Rule 9.330, Florida Rules of Appellate Procedure, and files its Motion for Rehearing. In conjunction, pursuant to Rule 9.331(c), Florida Rules of Appellate Procedure, Plaintiff/Appellee files its Motion for Rehearing En Banc.

STATEMENT OF THE CASE

1. On May 1, 1983 the yacht ALISAN V was totally destroyed by fire. Plaintiff/Appellee sued MERRILL STEVENS alleging the fire was caused by MERRILL STEVENS' negligence and/or breach of contract or warranties. A non-jury trial was held on March 10 and 11, 1986. The Court found the fire was caused by MERRILL STEVENS' negligence and/or breach of express and implied warranties. MERRILL STEVENS argued that not-

withstanding its negligence and breach of contract it should not be responsible for the destruction of the ALI-SAN V because of an exculpatory clause in its repair contract. The pertinent clauses in the repair contract are as follows:

> 1. Contractor agrees to repair said vessel in a good and workmanlike manner pursuant to the terms as outlined, and the owner and/or vessel agrees to pay contractor for said work, labor and materials as hereinafter stated. Other than specifically set forth herein, contractor makes no warranties concerning its workmanship or material either express or implied, including any implied warranty of merchantability or fitness for a particular purpose.
>
> * * *
>
> 7. Contractor undertakes to perform the work outlined * * * only upon the condition that it shall not be liable, directly or indirectly, in contract, tort, or otherwise * * * unless such (damage) is caused by contractor's gross negligence or the gross negligence of any of its employees, which gross negligence shall not be presumed but must be affirmatively established. *In no event, including the negligence and/or the gross negligence and/or the breach of contract by contractor, shall the contractor's liability to such parties in interest for personal injury, death or damage * * * exceed the sum of $300,000.00.*

2. After post-trial motions the court entered judgment on June 16, 1986 in favor of Plaintiff/Appellee in the amount of $222,249.00. The trial court denied Plaintiff's claim for attorneys fees.

3. On July 8, 1986, MERRILL STEVENS filed its Notice of Appeal. On June 23, 1987, this court rendered

its per curiam opinion in favor of MERRILL STEVENS, affirming in part and reversing in part the judgment of the trial court. The court affirmed the trial court's denial of attorney's fees and reversed the finding of liability on the part of MERRILL STEVENS. The per curiam decision was by majority.

MOTION FOR REHEARING

Plaintiff/Appellee seeks a rehearing on the following grounds:

A. Plaintiff/Appellee's claim arises from the breach of a maritime contract, that is, a contract to repair a vessel, and is thus governed by principles of maritime law. *See, e.g., Alcoa Steamship Company, Inc. v. Charles Ferran and Company, Inc.*, 383 F.2d 46 (5th Cir. 1967) *cert. denied* 393 U.S. 836. The United States Supreme Court in *Bisso v. Inland Waterways*, 339 U.S. 85, 75 S.Ct. 629, 99 L.ED. 911 (1955) expressly diaspproved exculpatory clauses in maritime contracts as contrary to the public policy of admiralty. *Accord, Edward Leasing Corp. v. Uhlig and Associates, Inc.*, 785 F.2d 887 (11th Cir. 1986). The majority does not mention the above cited cases. It is respectfully submitted that the majority overlooked controlling law mentioned above.

B. The issues raised by this case lie in the realm of admiralty and maritime law. This court has previously ruled that once maritime jurisdiction attaches the law to be applied is federal maritime law, not state law, regardless of the forum chosen. *Miami Valley Broadcasting Corp. v. Lang*, 429 So.2d 1333 (Fla. 3rd DCA 1983); *Booth Steamship Co., Ltd. v. Calzada*, 382 S.2d 425 (Fla. 3rd DCA 1980). In failing to apply the controlling federal

law, the majority has overlooked the law of this court compelling application of maritime law to cases sounding in admiralty.

C. The majority decision focuses on language in the first part of the subject exculpatory clause, overlooking subsequent language in the clause which expressly admits liability for negligence or breach of contract. The majority relies on part of the clause which purports to impose liability only if MERRILL STEVENS is grossly negligent. However, a subsequent section of the same clause states that MERRILL STEVENS is liable to the extent of $300,000.00 for "negligence and/or . . . gross negligence and/or breach of contract. . . ." The majority is silent as to the significance of this language. It is respectfully submitted that the dissenting opinion correctly notes that the parties and the drafters of the contract obviously envisioned circumstances where MERRILL STEVENS would be liable under theories of negligence, gross negligence or breach of contract. The subject clause is, at best, confusing, equivocal and ambiguous. Under either Florida law or maritime law, contractual language is construed most strongly against the drafter. *United States v. Seckinger*, 397 U.S. 203, 210-11, 90 S.Ct. 880, 884-85, 25 L.Ed. 2d 224 (1970); *Edward Leasing Corp. v. Uhlig and Associates, Inc.*, 785 F.2d 877, 89 (11th Cir. 1986); *Harbor One, Inc. v. Preston*, 172 So.2d 478 (Fla. 3rd DCA 1965). It is respectfully submitted that the majority overlooked the second section of the purported clause, and overlooked the applicable state and federal law concerning judicial construction of contractual terms.

Furthermore, paragraph 1 of the pertinent clauses (quoted in full on page 2 of this Motion) is an express

warranty "to repair said vessel in a good and workmanlike manner." Thereafter, in paragraph 7 (also quoted on page 2 of this Motion) MERRILL STEVENS attempts to insert an exculpatory clause. The meanings of these two clauses are diametrically opposed. This conflict was the basis of the trial court holding MERRILL STEVENS liable for breach of its express warranty. The panel decision is silent as to this conflict, and it is respectfully submitted that the panel decision has overlooked same.

D. The majority has overlooked or misapprehended the nature of the contract between the parties. The majority states: "This is simply an unambiguous arm's length transaction between parties of like bargaining power who were well able to allocate who was to bear the responsibility of insuring against what loss." The court has overlooked that there is a complete lack of evidence supporting the court's conclusion. The evidence showed that MERRILL STEVENS was awarded the repair contract based on a bid requested by a marine surveyor. R. 128. There was no evidence that the exculpatory clause was contained within their bid.

E. The majority overlooked the cases of *Todd Shipyards Corp. v. Turbine Services, Inc.*, 674 F.2d 401 (5th Cir. 1982) and *Parfait v. Johnecke Services, Inc.*, 484 F.2d 296 (5th Cir. 1973) which hold that damages in a case against a vessel repairer for breach of the warranty of workmanlike performance include litigation expenses and attorneys' fees.

MOTION FOR REHEARING EN BANC

Pursuant to Rule 9.331 (c), Florida Rules of Appellate Procedure, Plaintiff/Appellee hereby moves for rehearing

en banc. Pursuant to Rule 9.331 (c) (2), the undersigned counsel certifies as follows:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is of exceptional importance.

The reason for this belief is that the panel decision represents a departure from firmly established principles of law, and will have an enormous impact on Florida's boat owners. Florida is a boating mecca, with over 500,000 registered watercraft. The boating and boat repair industries are vitally important to Florida's economy. The panel decision will enable boat repairers to avoid liability for their negligence and shoddy workmanship simply by including ambiguous, convoluted or hidden exculpatory clauses in their contracts, the terms of which, by virtue of the vast difference in bargaining power, Florida consumers will have no opportunity to negotiate.

Equally important, by virtue of the majority decision the court has created a difference between state and federal interpretation of exculpatory clauses in marine repair contracts. The effect of this dichotomy is that subsequent disputes concerning construction of exculpatory clauses in such contracts will be decided not upon legal principles, but upon which court the suit is brought. This effectively destroys the uniformity of admiralty, and encourages the vice of forum shopping.

Further, pursuant to Rule 9.33 (c) (2) the undersigned counsel certifies as follows:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is con-

trary to the following decisions of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court:

In *Cigarette Racing Team v. Gandee,* 418 So.2d 337 (Fla. 3rd DCA 1982), this Court held that Federal maritime law governed a passive tortfeasor's indemnity claim against an active tortfeasor where the underlying tort was cognizable in admiralty. The court also refused to apply F.S. Section 371.52 (1977) because such application would be contrary to substantive principles of maritime law. *See also Miami Valley Broadcasting Corp. v. Lang,* 429 So.2d 1333 (Fla. 4th DCA 1983).

In *Booth Steamship Co., Ltd. v. Calzada,* 382 So.2d 425 (Fla. 3rd DCA 1980), this Court held that "[i]t is obligatory that federal maritime law be applied in both federal and state courts." *Booth Steamship,* 382 So.2d at 426. The court therefore reversed a directed verdict in favor of plaintiffs/appellees because the trial court failed to apply federal maritime law as set forth by the United States Supreme Court in *Moragne v. States Marine Lines,* 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970) and *United States v. Reliable Transfer Co.,* 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed. 2d 251 (1975). *See also, Bilbrey v. Weed,* 215 So.2d 479 (Fla. 1968).

The majority opinion in the case at bar is contrary to these cases because it fails to apply and follow the federal maritime law cited to the court in Appellee's brief and which has been cited herein.

Wherefore, Plaintiff/Appellee, VIVIAN ALVAREZ f/u/b/o AMERICAN HOME INSURANCE COMPANY,

by and through its undersigned counsel requests the court grant its Motion for Rehearing, quash the per curiam decision of June 23, 1987 and affirm the judgment of the trial court. Alternatively, Plaintiff/Appellee respectfully requests rehearing en banc as the decision of majority is of exceptional importance and is contrary to decisions of this court and of federal maritime courts, and consideration by the full court is necessary to maintain uniformity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this 8th day of July, 1987 hand-delivered a copy of the above Motion to Debra L. Brady, Esq., and Morton Good, Esq., Smathers and Thompson, Attorneys for Defendant/Appellant, 1301 Alfred I. Dupont Bldg, Miami, Florida 33131.

/s/ Domingo C. Rodriguez, Esq.
DOMINGO C. RODRIGUEZ, ESQ.